In fine the claim of the objector has not been heard at all and the distress has been wrongfully discharged. The order of the Court will be set aside.

If the plaintiff desires a fresh warrant of distress should issue, and if the present objector lodges a fresh objection, and deposits security, and both plaintiff and objector agree to the matter being tried by the Magistrate who issued the warrant of distress, the objection should be heard *de novo*.

The Magistrate should carefully follow the provisions of sec. 514 of the Civil Procedure Code.

The order on revision will be :—

(1) Order of Magistrate of 9.11.47 set aside.
(2) Goods to be re-seized, if plaintiff so desires, under original distress warrant and released subject to security being given by objector pending trial of issue as to ownership of the goods between himself and plaintiff.
(3) Issue of ownership to be tried, if both parties, i.e. plaintiff and objector, agree, by the Court issuing warrant of distress, or, if they do not agree, by a competent Court.
(4) Costs of trial of issue at new trial to be paid by plaintiff in any event.

Order accordingly.

TYE ONG CHOON v. MOHAMED ISMAIL.

[O. C. J. (Bostock Hill J.) September 10, 1948]

[Penang — Civil Suit No. 74 of 1948]

Mortgage — Conveyancing and Law of Property Ordinance (Cap. 118), s. 25(b) — Whether notice to mortgagor is necessary before sale under.

In this case the plaintiff sued the defendant for $1,857 being the balance due on an Indenture of Statutory Mortgage after the mortgaged property had been sold. It was argued that the sale of the mortgaged property was bad, as no actual notice of the sale was served personally on the mortgagor. At the time of the sale, there were arrears of interest due under the mortgage.

Held: (1) no notice to the mortgagor is necessary before a sale is held under s. 25(b) of the Conveyancing and Law of Property Ordinance, that is where interest under the mortgage is in arrear and unpaid for one month after becoming due; (2) on the facts of the case it could not be said that the plaintiff acted either oppressively or unfairly towards the defendant in selling the property.

Cases referred to:—

(1) *Jenaiboo v. Narianan Chetty & Anor.* 4 Ky. 359.
(2) *Warner v. Jacob* 20 Ch. D. 224.
(3) *Jones v. Matthie* 16 L.J. (Ch.) 405.

CIVIL SUIT.

Ong Huck Lim for the plaintiff.

E. Isaac for the defendant.

Bostock-Hill J. : —In this case the plaintiff sued the defendant for $1,857 being the balance due on an Indenture of Statutory Mortgage after the mortgaged property had been sold.

There was no dispute as to the amount and the only real point in the defence was that the plaintiff (Mortgagee) sold the property by public auction without giving direct notice of such sale to the defendant (Mortgagor).

The facts are shortly as follows :—

The principal sum became due on October 3rd, 1947 but there was no arrears of interest due until November 3rd, 1947.

On 31st October, 1947 plaintiff's Solicitor sent a notice to defendant (which was apparently served on 14th November, 1947) demanding repayment of the Principal together with arrears of all interest due, and stating that, failing compliance, he would enforce his power of sale under the Conveyancing and Law of Property Ordinance (Cap. 118).

On 16th December, 1947 defendant's Solicitor wrote to plaintiff (c/o his Solicitor) saying that he desired to pay off all Principal and Interest and asking for the Title Deeds to be sent for the necessary reconveyance to be prepared.

On 18th December, 1947 plaintiff's Solicitor wrote to defendant's Solicitor sending the Title Deeds. He heard nothing from defendant's Solicitor and on 31st December, 1947 wrote again asking for the return of the Title Deeds, and adding that unless he received a cheque from defendant by 2nd January 1948 in settlement of the Principal and Interest due he was instructed to have the said property sold by public auction.

On 3rd January, 1948 defendant's Solicitor wrote returning the Title Deeds and saying that he had no further instructions from defendant.

Thereupon plaintiff proceeded to advertise the sale of the said property by Public Auction on 15th January, 1948. Advertisements of this sale were published in the "Straits Echo" on 6th January 1948 and on 14th January, 1948 and notices were posted outside the Auction Room and numerous handbills were distributed.

No actual notice of the sale was served personally on the defendant and, because of that, the defendant claims that the sale is bad.

It is necessary to look at the wording of section 25 of the Conveyancing and Law of Property Ordinance. Sections 25 (a) and 25 (b) read as follows :—

A mortgagee shall not exercise the power of sale conferred by this Ordinance unless and until —

(a) notice requiring payment of the mortgage money has been served on the mortgagor or one of several

mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage is in arrear and unpaid for one month after becoming due.

It is clear that under section 25 (a) notice requiring payment of the mortgage money must be served on one of the mortgagors and there must be default for 3 months after such service before the mortgagee is entitled to exercise his power of sale under this sub-section.

Section 25 (b), however, simply states in effect that the mortgagee shall not exercise his power of sale "unless and until some interest under the mortgage is in arrear and unpaid for one month after becoming due."

In the present case plaintiff does not attempt to come under section 25 (a) but he claims to come under section 25 (b).

It is clear that when he exercised his power of sale on January 15th, 1948 there was more than 3 months' interest in arrears. Can it be said that he acted (i) illegally, or (ii) oppressively, in acting as has been set out above?

I cannot find any authority which lays it down that any notice to the mortgagor is necessary before a sale is held under section 25 (b), probably because the mortgagor must be taken to know that he is liable to have the mortgaged property sold as soon as he falls into arrears with his interest — a fact peculiarly within his own knowledge. Under section 25 (a) notice must be served on him because, unless it were served, he would have no means of knowing that there was the possibility of a sale. On the other hand if it were necessary to serve him when interest is in arrears then he could avoid or delay having the property sold by keeping out of the way.

I am fortified in this view by the judgment of Wood J. in *Jenaiboo v. Narainan Chetty & Anor.*[1]. After citing the judgments of Kay J. in *Warner v. Jacob*[2] and of Lord Cottenham (L.C.) in *Jones v. Matthie*[3] Wood J. remarks :—

> The principle enunciated in those two cases of **Jones v. Matthie** and **Warner v. Jacob**, seems to me to give to a mortgagee exercising a power of sale with every ingredient of disregard to the feelings and interests of others — of negligence and imprudence short of actual fraud — complete impunity. As Mr. Van Someren allowed me to put it, if suddenly without notice and without preparation, but still without fraud, the mortgagee resolved to sell the mortgaged premises at an auction held on that very day, he would not be answerable.

He then went on to state that such was the law in England and it appears that the law in England then and now was and is in close conformity with section 25 of the Conveyancing and Law of Property Ordinance.

Also I hold that, after the correspondence that had passed between the parties or their solicitors, and taking into account that Notice of the auction was twice published in the local Penang paper, it cannot be said that the plaintiff acted oppressively or unfairly towards the defendant.

Mr. Isaac for the defendant put in a somewhat late Amended Counterclaim but he argued very little in support of it.

I hold that the defendant fails on both his Defence and Counterclaim and give judgment for the plaintiff on his claim for $1,857 and on the Counterclaim with costs.

Judgment for plaintiff.

ONG AH KIM v. REX.

[A. Cr. J. (Gordon Smith Ag. C.J.) September, 11, 1948]

[Singapore — Magistrate's Appeal No. 91 of 1948]

Opium and Chandu Proclamation — Powers given to Comptroller of Customs to make rules with approval of the Deputy Chief Civil Affairs Officer — Whether rules published as made "with the approval of the Governor" are valid — Transfer of Powers and Interpretation Ordinance No. 2 of 1946.

The principal point raised in this appeal is that the amendment to s. 15 of the Opium and Chandu Rules 1948 by the Opium and Chandu (Amendment) Rules 1948 is invalid, as the amending rule was stated to be made "with the approval of the Governor" and not with the approval of the Colonial Secretary, who takes the place of the Deputy Chief Civil Affairs Officer, who is specified in s. 22 of the Opium and Chandu Proclamaton.

Held: (1) there is nothing to prevent the Governor himself exercising approval even where such approval has been delegated to the Colonial Secretary by legislative act and that in this case it was clear that the Colonial Secretary must himself have approved the rule prior to its formal submission to the Governor and subsequent publication in the Gazette; (2) the amending rule therefore had received the requisite approval prior to publication in the Gazette.

Cases referred to :—

(1) *R. v. Ho Soon Lye* 2nd District Court Case No. 3466 of 1947.

(2) *R. v. Teoh Ah Lai & Ors.* (1948) M.L.J.

(3) *Derby v. Bury Improvement Commissioners* L.R. 4 Ex. Case 222.

MAGISTRATE'S APPEAL.

D. K. Walters for the appellants.

Gordon Smith Ag. C.J. : — This appeal was heard on the 8th instant at the conclusion of which I reserved judgment as it involved highly technical matters arising out of Rule 15 of the Opium and Chandu Rules, 1948, issued under the authority of section 22 of the Opium